(1) Supreme Court, U.S.
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No_____

IN THE

SUPREME COURT OF THE UNITED STATES

MICHAEL W. AND YVONNE B. JONES,

Petitioner[s]

vs.

AMERICAN SAVINGS BANK, a corporation, N.A. Mortgage, INC., a corporation, PAT LANE, an individual, and DOES 1-100, inclusive,

Respondent[s]

On Petition For Writ Of Certiorari to the Court of Appeal State Of California Second Appellate District/ The California Supreme Court denial of review.

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED FOR REVIEW

(1) Whether this court should grant review of an opinion that rest primarily upon federal grounds and where the independence of an alleged state ground is not apparent from the four corners of the opinion. [To bring back uniformity to decisions throughout the United States by eradicating uncertainties in the law of the States usurping Federal Bankruptcy core matters.][App. 1-17]

(2) Did the State of California Second Appellate Court and the California Supreme Court deprive the Joneses of their right to a fair trial/ by court/ jury in determining their property rights in a court of competent jurisdiction as provided in the Fourteenth Amendment of the U.S as a result the following : [App. 1-17] [App. 19-20]

(3) In light of this courts ruling in **Steel Co v. Citizens for a Better Environment** 118 S.Ct. 1003 (U.S. 03/04/1998) which states in pertinent part that "..... *Hypothetical jurisdiction produces nothing more than a hypothetical judgment " ..... For a court to pronounce upon a law's meaning or constitutionality when it has no jurisdiction to do so is, by very definition, an ultra vires act."* Did the Appellate court affirm a valid or a void summary judgment by going ahead with a full blown out opinion interpreting how the stays and the discharges applied in Petitioners Bankruptcies on one hand in the face of affirming that the trial court did not err in concluding it lacked jurisdiction to rule on the Joneses' complaint. Hypothetically stating ..... " *Even If the foreclosure sale had violated the stay, appellants would have been required to raise that claim in the bankruptcy court. The Bankruptcy court ha[s] jurisdiction over all claims alleging willful violation of the automatic stay." [Citation.]*

The existence of a federal remedy for violation of the stay must be read as an implicit rejection of state court remedies". (Abdallah v. United Savings Bank (1996) 43 Cal. App.4th 1101, 1109)..... [App. 10.]

(3) In light of enbanc review of the 9th Circuits ruling **In re Gruntz** 202 F. 3d 1074 listing a long line of well settled cases and exhibiting this courts ruling in **In Re Kalb**, 308 U.S. at 439 .... ; and in light of **Steel Co v. Citizens for a Better Environment** 118 S.Ct. 1003 (U.S. 03/04/1998) Does the appellate court affirm a valid judgement in the face of the following: (a) State courts do not have jurisdiction to determine bankruptcy core matters/ The only court that can review a Bankruptcy core matter is the United States Supreme Court. (b) The Appellees answered the complaint without getting relief from stay from Mrs. Jones Chapter 13. (c .) The relief from stay that was obtained on November 5, 1997 was only in regard to the Property located at 1112 South Citrus Avenue - the stay was not annulled as to all other post petition actions before that time and post petition actions against Mrs. Jones personally and other properties (d) Although the appellate courts claims Washington Mutual to be a successor in interest to American Savings Bank they have never made themselves a party to this action (e). Although Judge Lewin and ASB were aware that Mrs. Jones was in a chapter 13 in which she was paying ASB for the arrearage at 1122 South Citrus - Judge Lewin/ASB allowed the action to continue in superior court knowing that state courts do not have jurisdiction to determine core matters for around a half of a year; when the Joneses moved it to the Bankruptcy court to pay the arrearage for 1112 South Citrus through Mr. Jones Chapter 13 ; and the appellees stated it was a state court matter moving it back to the superior court only to claim it a bankruptcy court matter; ASB did not put a claim in nor did they have a relief from

stay in Yvonne Jones then pending and now discharged Chapter 13.

(4) Whether the Court of Appeals erred in affirming the trial court's judgment based on standing and circumvented due process under the Fourteenth Amendment of the United States by depriving the petitioners of their property without adequate notice and hearing. By sua sponte ruling on Bankruptcy court standing , an issue that was raised sua sponte for the first time in the appellate court by the appellate court inferring that standing had been previously briefed ; by asking the parties to further brief the standing issues in a five page letter brief when standing was never briefed in the court below nor in any brief on appeal

(5) Did the appellate court and like wise the California Supreme by denying review ; denied respondents a right to a fair trial on every all issues and claims and denied equal protection of the law by circumventing the due process of their own government code § 6808 which corresponds to the Fourteenth amendment of the United States ; by determining Bankruptcy Standing which was highly fact dependent in this case and therefore far from a pure question of law, and which was raised without affording the petitioners any opportunity to gather the evidence necessary to support their argument that they have standing.

(6) Did the appellate court deprive the petitioners of their due process rights in a court of competent jurisdiction - under the Fourteenth Amendment by ignoring and by preventing the petitioners from defending their rights to sue respondents for injuries cause for an illegal and wrongful act which automatically voided the foreclosure sale predetermined by well settled law in the ninth circuit that a

violation of stay is void- not voidable- and is without effect exhibiting Article III Section 2 's standing requirements in which this court held that; a plaintiff must show " injury in fact," causation, and redress ability. **Lujan v. Defenders of Wildlife,** 504 U.S. 555, 560-561.

(7) Whether the Court of Appeals erred by affirming and awarding attorneys fees and costs on appeal, purportedly under Civil Code section 1717, without getting relief from stay to file a motion for attorney fees ; without a contractual or statutory basis, in violation and in conflict of California Supreme court law of deficiency judgments; without jurisdiction over the subject matter, regarding litigation over which it lacked original jurisdiction, and for costs and fees that were largely generated by the respondents' inconsistent positions.

(8) Did the court of Appeals error in concluding that the plaintiffs lacked standing because a court that lacks fundamental jurisdiction over the subject matter of the complaint and litigation is powerless to rule on litigant standing or any other claim or dispositive question.

Whether standing in bankruptcy court can apply to the JONESES causes of action if they were injured by the defendant's continued complained of conduct collateral to the Bankruptcy stay being predetermined void.

v.

PARTIES TO THE PROCEEDING

The Petitioners] in this case are Yvonne B. Jones and Michael W. Jones who are residents of the State of California.

The Respondents in the case are American Savings Bank a corporation - it has been stated that Washington Mutual Bank is formerly known as American Savings Bank ; however Washington Mutual is not a party to this suite.

The other parties are N.A. Mortgage a corporation and Pat Lane and individual.

ABBREVIATIONS AND REFERENCES

PETITIONERS YVONNE BRENT JONES AND MICHAEL W. JONES will be referred to as Petitioners; the Joneses

Appellees will be referred to as Appellees and AMERICAN SAVINGS BANK [ASB].

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PETITION FOR WRIT OF CERTIORARI

Petitioners] Yvonne Brent Jones and Michael W. Jones respectfully petition the United States Supreme Court for a writ of certiorari to review and reverse and declare void the Second Appellate Districts of the State of California and the Superior Courts Summary Judgment and the grant of attorneys fees on appeal and in the Superior Court that were granted without judicial authority; by the State court usurping Federal Bankruptcy core matters. Petitioners further petition the United States Supreme Court to declare void the orders , judgments entered without subject matter jurisdiction; without due process and in violation of bankruptcy stay - by the appellate court claiming hypothetical jurisdiction and on one hand declaring and affirming that the State courts do not have jurisdiction to determine bankruptcy stays then misapplying the Bankruptcy statutes and a relief from stay order ignoring that the Bank did not put a claim in on a contract; that was before the Bankruptcy was filed; in granting attorneys fees . The judgment on its face is void as it states on one hand that it cannot adjudicate any of the Joneses claims and then claims to have considered all evidence in entering summary judgment. Petitioners further petition this court to grant summary judgment in their favor as inter alia there is no opposition to this case. Based on the above and below.

OPINIONS AND ORDERS BELOW.

The denial of review of the California Supreme Court; The opinion of the State of California Second Appellate District printed in appendix pg 1-17; orders 22-24. The orders/ judgments of the Superior Court Dept. 4. Are printed in the Appendix pg. 18-22

JURISDICTION

FOR CASES FROM STATE COURTS: The jurisdiction of this United States Supreme Court is invoked under 28 U.S.C. § 1257 (a)

The date which the highest State Court decided my case was . February 2, 2000

JURISDICTION: As in this case ; once a substantial federal question has been properly raised or decided in the state court proceedings, the Supreme Court's jurisdiction under §1257 can attach to the case. Whether that jurisdiction can be sustained, however, will initially depend on whether the petition for certiorari preserves and presents federal questions that were in fact raised or decided below. If the federal questions presented to the Court faithfully reflect the basis of the decision of the highest state court, the Supreme Court's jurisdiction under § 1257 has ripened. As the court said in **McGoldrick v. Compagnie Generale**, 309 U.S. 430, 434 (1940) : " By virtue of the petition for certiorari addressed to the constitutional question which the state court decided, this Court has jurisdiction of the Cause." The state court here ignored the Joneses due process rights to have all issues adjudicated when the face of the superior court Judgment clearly states that they were not and the opinion clearly affirms the violations of due process inter alia.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty , or

property, without due process of law..." Constitution of the United States , Amendment Fourteen, Section 1.

" That right of a trial by jury shall remain inviolate. "

" The right to a fair trial in a court of competent jurisdiction.

United States Constitution : Federal and State violations of due process - equal protection- of clearly established constitutional rights.

Title 11§§ 101 (5) a& B ; 157; 362 ; 501; 524; 541; 542; and § 1328

California Government code § 6808 iii

Title 42 § 1983 ;Title 28 § 1334

WHY REVIEW SHOULD BE GRANTED

This case presents questions of critical importance to a growing number of not only California litigants - but litigants of all states. Although the Joneses then Attorney Maureen C. Taylor filed the instant action based on the well established law in the 9th circuit that a violation of an automatic stay is void not voidable. Filing the law suit not for the state court to determine the void sale but for causes of action based on the injury/ damages caused by ASB's illegal conduct in totally ignoring the rights of individuals under the Constitution and under the Bankruptcy laws. There is no law that gives ASB the right to self help in their efforts to display Economic power over the courts and statutes by continuously ignoring Bankruptcy injunctions. Nor for the States to conspire to deprive debtors of a fresh start after as here the Joneses' paying all arrearage to ASB to discharge. Clearly by not allowing the Joneses to have their case heard in any court. Obviously there is a violation of due process in the ambiguous orders /judgments
which clearly voids the unfair trial/hearing. Especially when the second appellate court not only usurps hypothetical jurisdiction but changes the rule of law of due process - without reason and issue an order which states in pertinent part - "IT IS FURTHER ORDERED that no extensions will be granted pursuant to any court rules." [App. 22] When the purported delay was in their corner. As well as the second appellate court circumvented the issue of standing as explained below by sua sponte bringing it up claiming it had been briefed previously by requesting 5 page short letter briefs on an issue that had never been briefed; then denied supplemental briefing [App. 23] and rehearing [App. 24]

Review is necessary to bring back uniformity to decisions throughout the United States by eradicating uncertainties in the law of the States getting involved with

Federal jurisdictional matters in Bankruptcy petitions. As discussed throughly in the 9th Circuits En Banc decision *(In RE Gruntz v. County of Los Angeles case* # 97-55379 - 202 F. 3d 1074 . To uphold Justice Rehnquist recent support for the doctrine of seperation of powers to stay out of state affairs and here for states to stay out Federal administration; reason being why Bankruptcy petitions are not filed in the State courts there fore states do not have the jurisdiction to enter hypothetical judgments based on an unreasonable application of clearly established federal law and federal bankruptcy law.

That the court remind the states that if they are not in agreement with the bankruptcy laws that it has to be changed by legislature not by Hypothetical judgments. Case law has been clearly stated, and the Legislature has not seen fit to change it by statute the state courts much less than the federal courts should not rob the legislature ; the people and the federal courts by stealing jurisdiction. the power to do so. court should not do so. to the contrary the 9th Circuit has enbanc review clearly states that have no power to interfere with and determine Bankruptcy matters especially matters of the administration of the estate. And until Legislature changes the laws and gives the states the power to regulate Bankruptcy the states should be stopped dead in their tracks . In doing so have violated the Joneses due process and deprive them of a trial in any court. their tracts from making these hypothetical judgments. The legislative intent is on unsound and the interpretation is not ambiguous.

The Jones through the advise of their attorney filed the law suit in the state court based on an already void action. Because in the ninth circuit - a violation of stay is void and without effect. Since the Bank ignored the Chapter 11.
And their agreement - The law suit was not asking the court to determine that the Bank violated the stay - but was based on the damages that were caused on a predetermined already void sale.

This case presents questions of critical importance to a growing number of California litigants. Review is necessary to bring uniformity to decisions throughout the State by eradicating uncertainties in the law of litigant standing and subject matter jurisdiction in actions based on the alleged violation of bankruptcy stays. This is necessary also to resolve a long-standing clash of opinion reflected in various decisions of the California Courts of Appeal and The Ninth Circuit Courts and the United State Supreme Court.

Review is also compelled by the need to harmonize California and federal court interpretations of the extent and limitations of exclusive federal court jurisdiction in the increasingly heavily trafficked path of bankruptcy related litigation, and to ensure the continuation of excellent relations between California and federal courts.

Moreover, review of the decision in this case is critical in order to ensure that litigants cannot again be deprived of the most fundamental due process rights by falling into a 'gap' between California and federal jurisdiction that today can be inadvertently created by a jurisdictional renvois.

Review is necessary to ensure that litigants will not be denied fair treatment in cases related to bankruptcy proceedings that involve determination of the validity, applicability and violation of the bankruptcy court's stay.

In litigation over the effects of a bankruptcy court stay, the rules regarding subject matter jurisdiction and litigant standing are intimately interrelated; the result of ruling on one of these issues in a vacuum, ignoring the other, can critically prejudice the litigants rights, as happened in this case.

When a court believes that it has power to consider only some legal arguments in a case, and not others, because it lacks jurisdiction over those legal considerations, the litigants are bound to suffer unequal advantages. Where for example the court decides that it is empowered to consider claims but not

defenses, or, as in this case, the court considers defenses but not counter-arguments which would neutralize the defense, the court has set out on a course that, even though inadvertently, is bound to result in the unfair treatment of one or another of the litigants. This happened in this case.

The rules regarding litigant standing and subject matter jurisdiction in this area of litigation, and their relationship, must be clarified to avoid depriving one party of the fundamental fairness of treatment by the court that constitutes the most essential ingredient of the due process that is guaranteed by the oldest traditions and highest principals of our law.

California courts have long sought to resolve difficult questions regarding litigant standing and the power of the Superior courts to preside over cases that present claims for relief based on the alleged violation of a federal bankruptcy court stay. Despite their best efforts, the extent of Superior Court subject matter jurisdiction in this area, and the rules regarding litigant standing to 'assert' a bankruptcy stay as the basis of legal or equitable claim or defense, remain unclear.

The en banc 9th Circuit Court of Appeals has

determined that the State courts do not have jurisdiction *to determine the core matters in bankruptcy petitions.* ***In re Gruntz*** *202 F.3d 1074 (9th Cir Feb.,2000)* . The time is therefore ideal for the Court to review this decision, which presents a near ideal opportunity to consider the interrelated questions of subject matter jurisdiction and standing in this area, in one case and to direct the California courts in the direction of Gruntz.

Resolution of the issues presented will substantially affect the administration of justice in California, and promises also to improve the already excellent comity in the relationship between California and federal courts.

Therefore the Court should grant review, stay enforcement of the judgment on the merits and the judgment

regarding fees and costs based on the violation of stay and the violations of discharge.

STATEMENT OF THE CASE

The Jones's were having trouble keeping up with the '90's. When Michael Jones was laid off and Yvonne Jones also found herself without work, despite their best efforts they were unable to keep up with the payments on their two residential properties.

After falling into arrears Mrs. Jones had an idea. By renting rooms to foreign exchange students they could generate more than enough income to satisfy the monthly mortgage and expenses. Armed with Mrs. Jones's business plan as a sales pitch, the Jones's made a series of overtures to ASB in an unsuccessful attempt to persuade the bank to restructure the debt informally. This is unfortunate because Yvonne's plan not only would have solved the Jones's problem, it would have solved the bank's problem also, and avoided time consuming health wrenching litigation. In fact, over the coming years, Mr. and Mrs. Jones applied this plan to a second residential property successfully with the appellees ASB and is now paying Washington Mutual. To date, they have made all payments and ASB has a successful loan to enhance its assets portfolio. The Bankruptcy is now discharged with ASB being paid in full.

Unable to persuade the bank to cooperate in an informal workout, the Jones's sought to formally restructure their debt and avoid forfeiture of their property interests by availing themselves of the protection of bankruptcy law. Although the bank refused to cooperate in an informal workout, the bank's agent promised the Jones's that the bank would delay its foreclose if the Jones's protected their interest by invoking the protection of the bankruptcy laws.

Relying on this representation, the Jones's sought protection, but were unable to qualify for Chapter 13 protection, and were unable to afford an expensive Chapter 11 action. When they received notice of the bank's intent to sell the property in foreclosure they took the advice of the Chapter 11 attorney they consulted and joined in a group Chapter 11 action. By transferring a 5% undivided fee simple interest in the property to a "coangelic" trust- to re-organize the properties under the trust. And thus obtained protection the trust - was specially designed to provide protection for the interests in the entire property, their remaining 95% interest became property of the Chapter 11 bankruptcy estate and protected by the automatic stay although the Jones's were not debtors in the Chapter 11 action[1].

They immediately notified the bank of their agreement and of the operation of the automatic stay. But the bank, also immediately, foreclosed anyway,

The Jones's sought legal counsel and were advised to commence a state court action to set aside the sale and quiet title, or, in the alternative, to seek legal damages for their loss due to the illegal sale, and the breach of the bank's promise, on which they relied. They brought an action in the Superior Court for Los Angeles County, arguing that the sale was void as a violation of stay is void. It constituted a willful violation of a federal order -- the stay under 11 U.S.C. § 362.and CC 2924. They argue that a violation of stay in the Th circuit is void making the complaint on a already predetermined void un validated sale.in violation of a federal statute and order [2]-

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[1]a trust set up to provide financial management for the entire properties of each individual to pay for their properties through payments to the Co-Angelic trust. to pay each creditor.

[2]**Hale v. Morgan** [22 Cal. 3d 388] California Supreme Court states: the due process clauses, federal and state are the most basic substantive checks on government's power to act unfairly or oppressively, As such, they

therefore an illegal, and wrongful action. They argue that the bank's action was illegal and void , and that the bank should not be allowed to profit by relying on a wilfully illegal action, done in knowing violation of an important federal law.[3] It is ancient learning that the courts will not support gain achieved by knowingly illegal action. The Jones's do not believe that they were attempting to assert the automatic stay, but were rather arguing that the bank's action in knowing violation of the stay was illegal and wrongful, and the courts should not allow the illegal transaction to stand and profit the wrongdoer.

However, after delaying more than a year, the bank moved for summary judgment, arguing that the California court lacked subject matter jurisdiction to determine whether the bank violated the stay (asserting the position that: "Since bankruptcy courts possess exclusive jurisdiction over all claims based on or arising out of a violation of an automatic stay, the state court could not adjudicate the claims alleged in the Verified Complaint."nor in the Joneses Motion for Summary Judgment.

The bank argued in the alternative that, even though the California Superior Court lacked jurisdiction over the question that is the key to the case, it should nevertheless hold that the bank had not violated the stay because the stay

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protect against infringements by the state upon this fundamental" rights" implicit in the concept of ordered liberty has similar application in the protection of property. Courts have consistently assumed that "oppressive or" unreasonable statutory penalties may be invalidated as violative of due process (see **People v. Western Air Lines, Inc.** (` 1954) 42 Cal 2d 621 [268 P. 2d 723])

[3]**Maine v. Thilboutot** 448 U.S.(1980) clearly established constitutional rights have been violated.

was later purportedly annulled[4] [however the defendants nor the plaintiffs were directly involved in the annulment order] -- arguing in a sense 'no harm; no foul' -- that is, even though the court (referee) had no jurisdiction to rule on the question of whether the stay was violated (foul was made), there.

Impressed with the purported sophistication of the bank's 'no jurisdiction' argument, the *pro SE* plaintiffs reasonably concluded that their counsel must have been wrong in recommending a state forum for the resolution of their dispute. They reasoned that they had better get a decision from a court that actually had the authority to decide the issues necessary to the determination of the case. (They were right.)

Because the Bank had claimed that they were going to reinstate the loan Mr. Jones filed a Chapter 13 and made all the payments to the trustee and moved the case to the Bankruptcy court. . But the bank's lawyer team, quickly changing jerseys, reversed their position 180 degrees and now argued that the state court was the proper and superior forum for the resolution of the Jones's claims. They then without due process requested that the case be dismissed and that the superior court case be remanded back to the Superior Court.

In retrospect it seems that, to the bank, the proper court was whatever court the Jones's were not in, and whatever court the Jones's happened to find themselves in ... could not possibly be the proper forum ... but of course the ***incompetent court should render a judgment in favor of the bank anyway.***

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[4]The Bankruptcy court purportedly annulled the stay of the Co-Angelic trust - However neither the appellants nor the appellees were part of the action. The bank never validated the sale. The annulment order did not apply to the Joneses property inter alia it violated the stay in Mrs. Jones Chapter thirteen and rights had already vested in the chapter 13 as well as the law suit; this matter was not adjudicated as per the judgment.

The Bankruptcy judge bought the bank's argument and remanded. Although in hindsight it seems obvious, in light of the doctrines of judicial estoppel and judicial admissions, that the federal court should have refused to allow the bank to assert the inconsistent position, and the California court on remand should have likewise refused, it appears that the question of whether California courts have jurisdiction to determine whether a party has violated a bankruptcy stay, and any claims "based on or arising out of a violation of an automatic stay," had not yet clearly been clearly settled in **Gruntz.** , and the bankruptcy judge was persuaded that the California court could, and was the most appropriate court to, resolve the issues in the case. After all, it was an in rem action seeking to quiet title in real property located in California, and this is an area of traditional, exclusive state court jurisdiction.

Courts have jurisdiction to determine their jurisdiction, and this is the only decision the trial court should have made: the decision that it lacked subject matter jurisdiction over all the plaintiffs' claims. But the Los Angeles Superior Court found itself now in a difficult position. The court had no jurisdiction over the subject matter, and the defendant bank had already taken this position. Subject matter jurisdiction cannot be waived by the parties, the objection to subject matter jurisdiction can be raised at any time, and the court has a duty to **raise the question of subject matter jurisdiction sua sponte even if the parties do not raise it.** This clearly deprived the Joneses of Equal Protection and due process.

On the other hand, the federal court had remanded, evidently confident that the California court had the power to decide the issues of the case, the defendant bank had argued in the federal court that contrary position, and there was therefore apparently no other court to resolve the controversy of the litigation.

While it may appear the ultimate in the field of the remarkable that the trial court, even in its written decision, at first announces that it lacks jurisdiction over the subject matter of the case, and then purports to proceed to render a decision in the case, the apparently befuddled court's effort is less easily ridiculed when viewed in the context of the untenable position in which the uncertainty in the law of jurisdiction placed the learned judge. a clarification of the rule of law is therefore imperative, not only for the past **and prospective plaintiffs and defendants of the world, but for jurists as well. California should assist the jurists and litigants of both California and federal courts by declaring in plain language the simple rule that California courts lack jurisdiction to determine whether a bankruptcy stay has been violated.** a clear violation of the enbanc court in **Gruntz.**

There are exceptions to the rule that the annulment of an order applies retroactively. The determination of whether such an exception applies is ultimately precisely the very same question which the court lacks jurisdiction to decide: whether a bankruptcy stay was violated -- the very question the California court itself declared that it was incompetent to decide. In rendering its decision the court was therefore acting in excess of its subject matter jurisdiction, and the judgment is therefore void. Burnham v. Superior Court of California, County of Marin, 495 U.S. 604 (1990); Residents for Adequate Water v. Redwood Valley County Water Dist., 34 C.A.4th 1801, 41 Cal. Rptr. 2d 123 (1994).

Here are two examples of the exception to the rule that an order intended to be retroactive applies retroactively to all parties and properties involved: Under California law, a retroactive order may not be applied when it would impair an existing contract or when to do so would impair a vested property right without due process of law. In re Marriage of

Hilke, 4 Cal. 4th 215, 217, 14 Cal. Rptr. 2d 371 (1991) (also defining a vested property right as one not subject to a condition precedent).

In the subject case, before the stay was annulled the Jones's had already filed a petition commencing a proceeding and acquiring protection under Chapter 13. Upon filing, the real property in question became property of the bankruptcy estate. The vesting of the real property as property of the bankruptcy estate prevented the operation of the Chapter 11 annulment, rendering the Chapter 11 stay in effect when the bank sold and purchased the Jones's home through foreclosure. This point seems to be a well settled point of California law. But regardless of how the question is ultimately decided, it must be decided by a federal district court, or by the bankruptcy court to which the proceeding and question is referred, and not by a California court that lacks the power to decide the question of whether a bankruptcy stay has been violated and attempts to change a discharge order from the Bankruptcy Court.

The Jones's argued a little imprecisely that the annulment of the Chapter 11 (first) stay violated the Chapter 13 (second) stay. It is probably more precise to say that the annulment does not retroactively affect the first (Chapter 11) stay because on filing the Chapter 13 proceeding, the Jones's property, if then owned by the Jones's or soon thereafter required by the them, became property of the Chapter 13 bankruptcy estate. This also is a determination for a federal bankruptcy court.

As the bank itself argue, "bankruptcy courts possess exclusive jurisdiction over all claims arising from violation of the automatic stay." (Def.'s MSJ Memo of Pts & Auth's at 1-2). All of the Jones's claims arise from the alleged violation of the automatic stay. As the defendant bank itself asserts: the

trial "court is not empowered to adjudicate any of the plaintiffs' claims." (Id. at 2).

Thus, the trial court, after being stuck with a case that belonged in federal court, which the Superior Court lacked the power to decide, but regarding which the bankruptcy court judge had evidently found enough slack in the rule regarding state court jurisdiction to justify abdicating in favor of a state court proceeding, the court reasoned that it was powerless to rule on the critical issues upon which the decision hinged -- whether a stay was violated. These forces practically compelled the court to take the path of least resistance and rule that the court need not consider the question of violation of the stay because the stay was not violated -- that is, the court reasoned that the stay could not have been violated because the stay did not apply to the plaintiffs' property, because the stay had been annulled, or because it had never applied to the plaintiff's property. Therefore, the court reasoned that the stay could not have been violated, a decision which is agreed to be within the exclusive jurisdiction of the federal courts.

An additional consideration is the doctrine under 11 U.S.C. § 542;541 explained in United States v. Whiting Pools. 462 U.S. 198 (1983) provides that security for a debt is subject to protection of the Bankruptcy court even after a creditor has attached it. This consideration also comes into play in the bankruptcy court's determination of whether the stay has been violated, and whether the debtor may recover the property pursuant to 11 U.S.C § 542. The history of this case points out the precise reason why it is a mistake for a state court to attempt to decide such a specialized question of federal law. Especially when the appellate court deprive the Joneses of due process by bringing up standing sua sponte three years after the case and after all the continuances of the Bank to protract the law.

Just when we thought it was safe to go back in the water ... we find ourselves not yet out of hot water. On appeal, the Court of Appeals, no doubt somewhat more savvy regarding the pitfalls of entering the realm of bankruptcy stay related jurisdiction, avoided the entire issue by first reaching sua sponte without proper notice and adequate time to respond the question of whether the Jones's had "standing" to assert the stay, and deciding in the negative, thereby dispensing with the case in one stroke. Violating all aspects of Jurisdiction.

(In California, the absence of subject matter jurisdiction below does not preclude the appellate court from reviewing the trial court's decisions. But neither can a decision by the reviewing court confer the power of subject matter jurisdiction on a trial court which lacks the power to act in the first instance. If this were true the courts of appeal could confer on trial courts the powers of the California Supreme Court, which would be a ridiculous result. In re **Gruntz .**

The Court of Appeals reasoned along with the bank and trial court that the trial court lacked subject matter jurisdiction to decide whether the stay was violated -- then continued to determine whether the stay was violated -- concluding that the stay could not have been violated because its protection probably, absent "special circumstances" did not reach the Jones's property interest. Thus like the trial court, the court of appeals evidently thought it could determine whether the stay protected the Jones's without deciding whether the stay was violated in relation to the Jones's and their property.

This is impossible. The Court of Appeals decision mirrors the bank's summary judgment motion and trial court's order, and, at best, the Court of Appeals's statements that the protection of the stay did not reach the Jones's and their property, and that the foreclosure sale was valid, are dicta. It

is certainly not necessary to the only decision that is possible in this case; that the court lacks power to adjudicate the controversy and decide any issue or claim in the Jones's complaint. This is the only question the court had power to decide.

The Court of Appeals also concludes that even if the California courts have jurisdiction to decide whether the stay is violated, which they do not, the Jones's lack standing to complain of these violations. This is dicta, because the court had already reached the question of whether the court had subject matter jurisdiction and concluded that the court lacked jurisdiction to rule on the Jones's complaint. Once the Court of Appeals decided that the court was powerless to umpire the game, it cannot then authoritatively decide that this particular batter is not authorized to bat.

But if it were, it would owe the Jones's at least a chance on remand to substitute the proper party in their complaint, the trustee, who has standing and is authorized to complaint of violations of the stay, such as here, where there are certainly "special circumstances." The Jones were deprived of equal protection and due process by the court not the bank coming up with standing in a minute; after much time had passed almost three years - taking away the Joneses opportunity to properly respond and take the necessary actions in discovery etc.- on this mixed question of law.

Even after all this, perhaps the most important point is that the Jones's were denied due process by the Court of Appeals. Upon determining sua sponte, and at that late date, that standing was an issue. The court decided to hear this issue, which was not raised in the trial court, afforded the plaintiffs no opportunity to gather evidence to support the argument that they have standing, and allowed a short period of time to brief the question; misrepresenting that it had been briefed in the first place.

When an issue has not been raised at the trial court level, only pure questions of law may be raised on appeal. The question of standing is a mixed question of law and fact, highly dependent upon the very special circumstances of the nature of the plaintiffs association and agreements with the coangelic trust, which was specifically designed to protect the cotenant' interests, and which succeeded to do so regarding hundreds of other nondebtor property interests. The plaintiffs believe they could demonstrate that they have standing, if the court possesses subject matter jurisdiction or to a court with the jurisdiction.

However, because the court lacks subject matter jurisdiction, it has no authority to decide the question of standing as it applies to the Bankruptcy court. The courts owe the Jones's a clear decision as to whether the California court has jurisdiction over the subject matter of their complaint. If not, they must be free to pursue their claim in federal court, after a dismissal without prejudice. Or the case remanded back to be heard on the merits of the quiet title. It is clear that the Joneses causes of actions were not adjudicated by the superior court and the results in the appellate court.

If the court does have jurisdiction over the subject matter, the courts owe the Jones's the opportunity to gather facts, properly research and brief the standing issue. This depends not so much on the law regarding standing, although that rule is not perfectly clear in the history of the California decisions on point. This depends first of all on the Jones's being afforded a reasonable amount of time for discovery regarding the coangelic trust and standing. File motions accordingly - examine whether latches apply here - after all - time has deprived the Joneses of due process and may have destroyed proper discovery.

And even if the plaintiffs are found to lack standing, the courts owe the Jones's the opportunity to return to the

trial court and amend their complaint accordingly. The appellate court clearly deprived the Joneses of equal protection and due process under the Fourteenth Amendment of the United States.

LEGAL DISCUSSION

I. Subject Matter Jurisdiction and Fundamental Due Process

The Court of Appeals erred by affirming a judgment entered by a trial court that lacked power to hear the case because it had no jurisdiction over the subject matter of the action and acted in excess of its jurisdiction, and where that trial court itself determined that it lacked jurisdiction over the subject matter jurisdiction and was acting without power to "adjudicate the claims alleged in the Complaint .... since bankruptcy courts possess exclusive jurisdiction over all claims based on or arising out of a violation of an automatic stay."

a judgment is void on its face if the rendering court lacked subject matter jurisdiction. Burnham v. Superior Court of California, County of Marin, 495 U.S. 604 (1990); Residents for Adequate Water v. Redwood Valley County Water Dist., 34 C.A.4th 1801, 41 Cal. Rptr. 2d 123 (1994). As both the courts and the defendant bank in this action agree, the trial court lacked subject matter jurisdiction and was powerless to hear any claim in the plaintiffs' complaint.

The defendants are likely to respond by arguing that the trial court acted properly, having fundamental subject matter jurisdiction to consider some issues while lacking subject matter to consider other issues, and taking care to avoid acting in excess of its jurisdiction.

Its reasoning conflates and confuses the concepts of issue and claim. It also falls apart when examined in light of the arguments and facts the plaintiffs would provide if given the proper opportunity to obtain and present those facts and legal arguments.

The court's quick conclusion that the plaintiff's could not have standing because they are nondebtors is extremely questionable. The resolution of that question is dependent upon facts the plaintiffs have not yet been allowed to present ... because the court supposedly lacks jurisdiction to consider whether the bankruptcy stay applies and has been violated.

In plain language, it is simply not possible to consider whether a stay is violated without first considering whether it applies. The Th Circuit Court of Appeals recently struggled with this issue in ***Gruntz v. Los Angeles*** 202 F .3d 1074 Th Circuit Feb, 2000.} reasoned that a distinction could be made between the question of whether a stay applies and the question of whether a stay has been violated, and then withdrew its decision, which reviewed by the court en banc in which it make a clear distinction of state courts powers. In addition the California Court of Appeals has previously concluded that a court has no power to determine standing when it lacks jurisdiction over the subject matter of the litigation.

a trial court may not preside over claims over which it has no subject matter jurisdiction; and it may not decide to go on to decide various issues of the case. It fails to satisfy the most essential requirements of due process by selectively hearing the legal arguments presented by one party, announcing that these considerations are within its "jurisdiction," while

refusing to allow the other party to present the evidence and legal arguments necessary to establish its position, because the court lacks "jurisdiction." Both judgments rendered by a court lacking fundamental subject matter jurisdiction and judgments rendered by an otherwise competent court acting in excess of its subject matter jurisdiction are void (*Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 288,* 109 P. 942 (1941)). The judgments in this case are void. The court lacked jurisdiction over the subject matter, and the Supreme Court should establish a clear jurisdictional rule that litigants in California courts can rely on.

II. Standing

* By the court circumventing the Joneses rights to due process by inferring in the letter that both sides needed to further brief standing - when standing had not only never been briefed but the court deprive the Joneses of their due process rights to equal protection of the law. An example being that

> *The Court of Appeals erred by ruling on standing, an issue that was raised for the first time on appeal, which was highly fact dependent and therefore far from a pure question of law, and which was therefore raised without affording the plaintiffs any opportunity to gather the evidence necessary to support their argument that they have standing.*

A. *The Court of Appeals erred in ruling on a mixed question of fact and law that was not raised at trial.*

An issue must be raised in the trial court to be argued on appeal *(Parker v. City of Fountain Valley, 127 C.A.3d 00, 117, 179 C.R. 351 (1981)).* An exception exists

for issues of pure law *(California Pools, Inc. v. Pazargad, 131 C.A.3d 601, 182 C.R. 568 (1982) (interpretation of statutes))*. But the question of standing in this case is far from a question of pure law. In fact, the present case illustrates well the precise reason why only questions of pure law are and should be excepted from the rule prohibiting consideration on appeal of issues not raised in the trial court.

The determination of whether these particular plaintiffs lack standing requires a highly fact intensive analysis and additional legal analysis, including discovery and analysis of the contractual and trustee-beneficiary relationships between the plaintiffs and the Puerto Rican coangelic trustee and trust. Bankruptcy law provides for debtor and nondebtor standing where special circumstances are **In Re Balic 712 F2d ,426 (1983) United States v. Whitting Pools, Inc.** 462 U.S. 198 (1983) , and a federal bankruptcy court is the proper and best forum to consider these legal subtleties which are unique to the realm of bankruptcy jurisprudence.

Due process requires that the parties be afforded the opportunity to present evidence to support their arguments where issues of fact are involved. As a general rule the undivided tenancy in common property interests of one real property cotenant (cotenant a) does not become protected property of a bankruptcy estate merely because his respective cotenant (cotenant B) commences a bankruptcy action and obtains the protection of the automatic stay for his property interest. (*See generally cases cited under West key topic Bankruptcy 2396.*)

But there are acknowledged exceptions to this general rule. And these exceptions require a fact intensive review. For instance, a cotenancy interest held by a marriage partner as a tenancy by the entirety generally, but not always, is excepted from this rule and protected by the automatic stay. Likewise, other causes of action are protected by the stay even when property of the estate is held by a nondebtor. This is the case

in actions seeking to pierce the corporate veil in order to reach property of the bankruptcy estate that is held by an entity other than the debtor. *(See, e.g., S.I. Acquisition, Inc., v. Eastway Delivery Serv., Inc., 817 F.2d 1142 (5th Cir. 1987).)*

The plaintiff's real property interest was bound up with a related interest not only by a property cotenancy but also by an agreement and trust formation documents that the plaintiffs assert qualified their property interest as property of the Chapter 11 Bankruptcy Estate, and therefore initially afforded them both protection and the same standing that is afforded debtors in a Chapter 11 proceeding.[1] The factor that determines whether a party has standing is not whether he is a debtor, but whether he holds legal title to the property at the time the bankruptcy petition is filed. *(Bostanian v. Liberty Savings Bank, 52 Cal.App.4th 1075, 61 Cal.Rptr.2d 68 (1997)).*

The plaintiffs argue that these factual circumstances are precisely the type that qualify the "special circumstances" under which the debtors and even nondebtors may have standing to assert the protection of the stay. Such a determination is a type which should be reserved for a federal district court judge, and federal bankruptcy court judge, who have special and unique expertise in resolving bankruptcy law based issues.

In addition, if the Court of Appeals had the power to consider the issue of the plaintiff's standing, under the rule of *Bostanian* it was obligated to direct the trial court to afford the plaintiffs the opportunity to substitute the party who did possess standing, and a reasonable time to do so. (*See also Haley v. Dow Lewis Motors, Inc., No. C029377 (Cal.App. Dist.3 05/24/1999).*) The courts are obligated to afford the plaintiffs an opportunity to gather and present evidence to demonstrate their status as debtors, or owners of property of the bankruptcy estate, in order to demonstrate

their right to bring the suit, in their own names such as amend the complaint to clearly include the federal violations in depriving them of their interest in the property.

B. *The Court of Appeals erred in concluding that the plaintiffs lacked standing because a court that lacks fundamental jurisdiction over the subject matter of the complaint and litigation is powerless to rule on litigant standing or any other claim or dispositive question.*

C. *Even if the Court of Appeals had the authority to rule that plaintiffs lack standing, it erred in affirming the trial court's judgment based on standing. While the courts of appeal may affirm a trial court's judgment for reasons that differ from the trial court's, if the Court of Appeals rules that the plaintiffs lack standing to assert a claim based on the alleged violation of a bankruptcy stay, the court must afford the plaintiffs an opportunity to return to the trial court and submit facts for the purpose of establishing that they are entitled to the protection of the stay. And, under the rule of Bostanian, the Court must afford the plaintiffs the opportunity, and reasonable time under the circumstances, to amend their pleadings accordingly.*[5]

Fundamental due process requires that litigants be afforded an opportunity to gather and present evidence and have the opportunity to support their case with legal and

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[5]**Maine v. Thilboutot** 448 U.S.(1980) states the 1983 remedy broadly encompasses **violations of federal statutory as well as constitutional law. Rosado v. Wyman 397 (1970).** The Joneses were deprived to the right to amend after the surprise of standing made almost three years after the filing of the complaint.

factual argument. This right is particularly important the legal arguments asserted against them would dispose material issues of their case, or dispose of the case entirely, in one stroke. The Court of Appeals owes the plaintiffs the opportunity to present evidence and have the time necessary to gather facts and research the law in order to support their position regarding standing.

D. ***If the plaintiffs lack standing, the trial court lacked jurisdiction to decide any claim or material issue of the case.***

If the plaintiffs lack standing to bring this suit, the courts lack jurisdiction to consider it. (*Allen v. Wright, 104 S. Ct. 3315, 3324-25 (U.S. 1984)*). If the plaintiffs lack standing to assert their claim, the court is incompetent to render a valid judgment regarding their claim. It certainly cannot summarily dispense with their claims while refusing to consider the issues that are critical to their claims because they lack "standing," while proceeding to purport to render a judgment based on a consideration of only some of the facts and legal arguments the litigants seek to present.

III. Attorneys Fees

The Court of Appeals erred by awarding attorneys fees and costs on appeal, purportedly under Civil Code section 1717, without a contractual or statutory basis, without jurisdiction over the subject matter, regarding litigation over which it lacked original jurisdiction-diction, and for costs and fees that were largely generated by the defendant bank's inconsistent positions regarding jurisdiction.

The Court of Appeals erroneously awarded defendants fees and costs in this case. No contract exists to base an award of attorneys fees. And no statutory authority exists. In addition, much of these fees were

generated by the defendant banks reversal of its position and legal argument regarding California jurisdiction.

Based on the bank's position, which it argued in its summary judgment motion, that the Superior Court lackedjurisdiction over any of their claims, the plaintiffs were persuaded to seek a forum that was competent to hear their claims. After removing their action to the federal Bankruptcy Court, they were treated to the bank's reversal of position, in which it argued to the Bankruptcy Court that the Superior Court was not only a competent tribunal, and the proper and superior forum to hear the plaintiff's case

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When the bank succeeded in persuading the Bankruptcy Court to remand the action, the plaintiffs were forced back into the California Superior Court against their will, and then subjected to an ill-considered decision by a court that is by its own admission incompetent to consider the plaintiff's claims and incompetent to consider issues that are critical to the plaintiff's case and to their ability to effectively counter the bank's defenses. Then, on appeal, these *pro SE* plaintiffs were informed by the Court of Appeals that the court need not reach the jurisdictional issue because the plaintiffs lacked "standing" to pursue the action.

This resulted in the bizarre and untenable present situation in which the plaintiffs, attempting to respond to were tossed from court to court, subjected to a judgment by a court that admitted it lacked subject matter jurisdiction, then denied a hearing on that issue by a court of appeals that refused to reach the jurisdiction question after concluding that the plaintiffs lacked standing to assert their claim without allowing

them time to gather evidence which would demonstrate that they in fact possess standing or the proper opportunity to brief an issue that was not briefed previously. Additionally, and as a result of the preceding, the Court of Appeals then stunned the plaintiffs by awarding the bank $65,000 in attorneys fees in violation of a bankruptcy discharge and a violation of a stay as well as much of which undeniably was generated by the bank's nimble change in position as it first argued against California jurisdiction and then argued in federal court that the California Superior Court was the ideal forum. It would be ludicrous to uphold an award of attorneys' fees on these facts and without jurisdiction to do so. Especially in the face of conflicting laws

.

Even if there existed a statutory or contractual basis for an award of attorneys fees in this case [which there is not] , these plaintiffs must not be required to suffer the burden of their opponents fees that were generated by their nimble 180 degree changes in position. a violation of constitution and attorneys fees in federal courts. And without jurisdiction and in violation of state and federal statute. In the first place, based on the doctrine of judicial admissions the defendant bank should be disallowed to change its position. Then, based on the policy underlying the doctrine of judicial estoppel, the bank should be disallowed to assert the inconsistent second position it asserted in the federal court, and should certainly not be allowed to gather attorneys fees for an action that makes a mockery of our system of justice by arguing inconsistent positions to state and federal tribunals in order to effectively deny

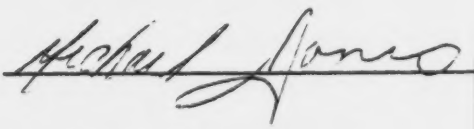
the injured plaintiffs a hearing in a competent court of law.

CONCLUSION

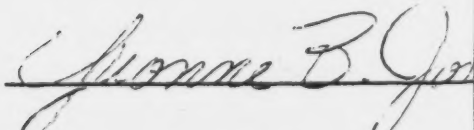
For all the foregoing reasons, the Court should grant review to void every judgment of the courts below AS VIOLATIVE OF DUE PROCESS AND GRANT THE JONESES SUMMARY JUDGMENT AND OR REMAND BACK FOR a FAIR TRIAL FOR DAMAGES. and the judgment regarding fees and costs in light of the ninth circuit enbanc decision in Gruntz and the long line of cases discussed in Gruntz and above. The Second appellate court and the superior court clearly has misapplied clearly established Bankruptcy law - and denied the Joneses opportunity to respond in a court of competent jurisdiction.

Dated:
7/3/2000

Respectfully submitted,

By: 

MICHAEL JONES

By: 

YVONNE B. JONES

Second Appellate District, Division Five, No,
B122905/B126794 S083978

IN THE SUPREME COURT OF CALIFORNIA
EN BANC

MICHAEL WILLIAM JONES Et Al., Appellants

v.

AMERICAN SAVINGS BANK ET. AL., Respondents

Appellants' petition for review Denied.

CHIN
Acting Chief Justice

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

MICHAEL W. JONES et al.,	) B122905 and B126794
	)
Plaintiffs and Appellants,	(Super. No.BC149236)
	)
	)
v.	)
	)
AMERICAN SAVINGS BANK et al.,	)
	)
(Defendants and Respondents.	)

OPINION
(Filed Oct. 12, 1999)

APPEAL from a judgment of the Superior Court of Los Angeles County. Kurt J. Lewin, Judge Affirmed.

Michael William Jones and Yvonne B. Jones, in pro. per., for Plaintiffs and Appellants.

Stroock & Stroock and Lavan, Julia B. Strickland and Scott M. Pearson for Defendants and Respondents.

Plaintiffs and appellants Michael and Yvonne Jones appeal from the summary judgment entered in favor of

defendants and respondents American Savings Bank,[1] N. A. Mortgage Services, Inc., and Pat Lane in this action to quiet title to property Bank acquired by non judicial foreclosure. The Joneses also appeal from the award of attorney's fees in favor of Bank. We conclude the Joneses have no basis to challenge the foreclosure and affirm.

FACTS AND PROCEDURAL BACKGROUND

On April 22, 1992, Bank loaned the Joneses $420,000.[2] The obligation was secured by a note and deed of trust on the subject property. N.A. Mortgage was the trustee. The deed of trust was recorded on May 4, 1992. The Joneses made payments on the note until June 1, 1995, then stopped making payments. On December 21, 1995, N.A. Mortgage recorded a notice of default and election to sell under the deed of trust. The sale was noticed for April 19, 1996.

On April 18, 1996, in an effort to obtain protection by means of the automatice stay in bankruptcy (11 U.S.C. § 362) without actually filing bankruptcy, the Joneses transferred a five percent interest in the property to the Coangelic Trust, and entity which was then in Chapter 11 bankruptcy in Puerto Rico.[3]

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[1]Washington Mutual Bank is the successor in interest to American Savings Bank.

[2]The loan was apparently a refinancing of an earlier obligation.

[3]The Joneses explained that the business of Coangelic " was to buy , sell, manage and direct properties in the normal course of business protecting such properties with a stay and payment to creditors until the Chapter 11 plan was confirmed."

The Joneses notified Bank and N.A. Mortgage[4] of the transfer and the Coangelic bankruptcy. N.A. Mortgage proceeded with the foreclosure sale as scheduled. On April, 19, 1996, Bank purchased the property with a full credit bid. A deed on sale was recorded on April 23, 1996. Also on April 23, 1996, Michael Jones filed a petition for bankruptcy under Chapter 7.

On May 2, 1996, the Joneses filed the instant action, [5] seeking to quiet title to the property, arguing the foreclosure sale was void as conducted in in violation of the automatice stay in the Coangelic bankruptcy. On July 31, 1996, the Joneses filed their first amended complaint. The complaint stated causes of action for quiet title, cancellation of deed, declaratory relief, and conversion. Each cause of action was based on the violation of the automatic stay in the Coangelic bankruptcy. On July 2, 1996, Yvonne Jones filed a petition for bankruptcy under Chapter 13. [6] On August 7, 1996, Michael Jones obtained a discharge in his Chapter 7 bankruptcy.

On August 8, 1996, the Puerto Rico Bankruptcy Court dismissed Coangelic's petition with prejudice. The court further held "that the automatic stay is anulled as to any interest

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[4]Codefendant Lane was the N.A. Mortgage employee notified by the Joneses.

[5] Michael had listed the property as an asset in his bankruptcy. As a Chapter 7 debtor , he could bring or maintain this action only with approval of the bankruptcy court and trustee. (Bostanian v. Liberty Savings Bank

[6] During this time, the Joneses remained on the property. Bank filed unlawful detainer actions, but relief from the automatic stay was denied.

claimed by the debtor in any real property and as to anyone claiming to be a transferee from the debtor. This is effective as of March 12, 1996." Thus, the order retroactively annulled the stay as of a date prior to the foreclosure sale.

On March 21, 1997 , Michael Jones filed a petition for bankruptcy under Chapter 13.

On May 12, 1997 , defendants moved for summary judgment on the basis that the bankruptcy court had retroactively annulled the automatic stay in the Coangelic bankruptcy. Defendants also argued the California courts lack jurisdiction to determine whether the automatic stay had been violated.

The Joneses responded to the motion for summary judgment by filing a notice of removal to the bankruptcy court where Michael Jone's Chapet 13 petition was pending. [7]

On June 10, 1997 , at the hearing on the motion for summary judgment , the trial court acknowledged that it had no jurisdiction due to the notice of removal.

On June 30, 1997, Michael Jones's Chapter 13 Bankruptcy was dismissed by the bankruptcy court, and this case was returned to the superior court. Michael Jones filed a motion to vacate the dismissal in bankruptcy court; this motion was denied on August 20, 1997.

With the action again active in the trial court, defendants refiled their motion for summary judgment. Hearing on the motion was set for December 9,1997.

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[7] The Joneses also filed a substantive opposition.

On November 5,, 1997, Bank obtained relief from the qutomatic stay in Yvonne Jone's bankruptcy, the only remaining Jones bankruptc. The bankruptcy court ordered the stay terminated " against any and all subsequent voluntary and involuntary filings by any person or entity" with respect to the property. Bank was specifically permitted to proceed against the Joneses in any manner, including unlawful detainer and the instant quiet title action.

In opposition to the refiled motion for summary judgment, the Joneses raised three new arguments. First, they contended Bankr could no longer argue against jurisdiction because Bankr had sought , and received, remand from the bankruptcy court. Second, they objected to Bank's request for judicial notice of the August 8, 1996 order retroactively anulling the stay in the Coangelic bankruptcy, on the basis that it was inadmissible hearsay.[8] Third, they took the position that the order retroactively anulling the stay in the Coangelic bankruptcy violated the stay in Yvonne Jones's then-pending Chapter 13 bankruptcy.

The trial court granted the motion for summary judgment , on the basis that it lacked jurisdiction over causes of action based on violation of the automatice stay. Alternatively, the trial court found that defendants had not violated the stay because the stay had been anulled retroactively. Judgment was entered in favor of all defendants. The Joneses filed a timely notice of appeal (B122905).

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[8] The Joneses, who had been proceeding in propria persona but obtained counsel to argue the motion, did not reassert this objection at the hearing on the motion and did not obtain a ruling. It is therefore considered waived. (Code Civ. Proc., § 437c, subd. (b).)

Bank then moved for an award of costs and attorney's fees, pursuant to an attorney's fee clause in the deed of trust. The Joneses opposed the motion, arguing, among other things, that an award of attorney's fees in the amount of $60,548, and costs in the amount of $4,027.06. The Joneses then filed further opposition to the attorney's fee award, [9] in which they contended the award of attorney's fees constituted a prohibited deficiency judgment. The motion to tax the costs was denied. The Joneses filed a timely notice of appeal from the denial of the motion to tax the costs (B126794).[10]

In their brief on appeal, the Joneses represent that Yvonne Jones obtained a discharge in her Chapter 13 on August 24, 1999. It therefore appears that no parties are presently in bankruptcy. [11]

DISCUSSION

I. Summary Judgment Motion

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[9] The timing of the filings is not entirely clear. It appears that Bank filed a motion for attorney's fees and the Joneses responded with a motion to tax costs. However, there was an issue as to the propriety of service of the Joneses" motion. Thus, although the trial court granted Bank's motion for attorney's fees on July 10, 1998, the Joneses' cross-motion was reset for September 15, 1998, and briefing continued

[10] At the same time, the Joneses attempted to appeal from the trial judge's refusal to disqualify himself pursuant to the Joneses'

[11] As this suit initiated by the Joneses, no Jones bankruptcy would stay this appeal. (Shah v. Glendale Federal Bank (1996) 44 Cal.App.4th 1371,1373.)

A. Standard of Review

"The policy underlying motions for summary judgment and summary adjudication of issues it to " promote and protect the administration of justice, and to expedite litigation by elimination of needless trials.''''' (Hood v. Superior Court (1995) 33 Cal.App.4th 319, 323.)

"Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding." (Code of Civ. Proc., § 473c, subd. (a).) The motion and the opposition to the motion " shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken." (*Id.*, subd. (b).) Separate statements setting forth plainly and concisely all material facts which the parties contend are undisputed must be included. (*Ibid.*) " Evidentiary objections not made at the hearing shall be deemed waived." (*Ibid.*) " The motion for summary judgment shall be granted if all the papers submitted show that there is no tirable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining whether the papers show that there is no triable issue as to any material fact the court shall consider all of the evidence... and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted on inferences reasonable deducible from the evidence, if contradicted by other inferences or evidence, which raise a triable issue as to any material fact. " (*Id.*,subd. (c); KOVR-TV, INC v. Superior Court (1995) 31 Cal.App.4th 1023, 1028.)

A defendant or cross-defendant meets his or her burden upon motion for summary judgment or summary adjudication

if that party has proved " one or more elements of the cause of action... cannot be established, or that there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (o)(2).) " Once the defendant or cross- defendent has met that burden, the " burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists... " (Code Civ. Proc., § 437c, subd. (o)(2).

It is well-established that appellate review of a summary judgment is confined to "the gravamen of [plaintiffs'] complaint." (Ann.M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666,673.) The moving party's burden on a motion for summary judgment is to establish that there is no triable issue as to any material fact and that the moving party is entitled to judgment " on the issues raised by the pleadings." (Joseph E. Di Loreto, Inc. V. O'Neill (1991) 1 Cal.App.4th 149, 156.) The moving parth is not required to refute liability on some theoretical possibility not included in the pleadings." (*Ibid.)* The " Pleadings serve as the outer measure of materiality in a summary judgment proceeding. " (*Ann. M. v. Pacific Plaza Shopping Center, Supra*, 6 Cal.4th at p. 673; *Joseph E. Di Loreto, Inc. V. O'Neill, supra, 1 Cal.App.4th at p. 156.)*

On appeal, we exercise " an independent assessment of the correctness of the trial court's ruling, applying the same legal standard as the trial court....." (*Iverson v. Muroc Unified School Dist.* (1995) 32 Cal.App.4th 218,222; *Union Bank v. Superior Court, supra,* 31 Cal.App.4th at p. 579.)

B. <u>Violation of the Automatic Stay</u>

The basis of the Joneses' complaint is that the foreclosure sale was viod because it violated the automatic stay

in the Coangelic bankruptcy.[12] The california courts lack jurisdiction to resolve this claim. " Even if the foreclosure sale had violated the stay, appellants would have been requires to raise that claim in the bankruptcy court. 'The bankruptcy court ha[s] jurisdiction over all claims alleging willful violation of the automatic stay.' [Citation.] The existence of a federal remedy for violation of the stay must be read as an implicit rejection of state court remedies". (*Abdallah v. United Savings Bank (1996)* 43 Cal.App.4th 1101, 1109.) The trial court did not err in concluding it lacked jurisdiction to rule on the Joneses' complaint.

Even if California courts have jurisdiction over claims of violations of the automatic stay, the Joneses lack standing to complain of violations of the automatic stay in the Coangelic bankruptcy. In the absence of special circumstances, bankruptcy stays do not reach nonbankrupt co-debtors. Special circumstances do not exist merely because the co-debtor is jointly liable with the bankruptcy debtor. (*Federal Land Bank of Spokane v. Stiles (D. Mont.* 1988) 700 F. Supp. 1060, 1062-1063.) While the bankruptcy stay protects property held by tenancy in the entirety (In re Ward (3d Cir. 1988) 837 F.2d 124, 125-126), it does not protect co-debtors whos interest is simply held in common. (Civ. Code, § 686.) Therefore, the stay in the Coangelic bankruptcy did not affect the Joneses, and Bank was free to foreclose on their interest. For this reason, we ject the Joneses' arguments that the order retroactively anulling the

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[12] In opposition to motion for summary judgment, the Joneses argued that the foreclosure sale also violated an oral agreement. As this claim was not alleged in the Joneses' complaint, defendants were not required to refute in their summary judgment motion.

stay in the Coangelic bankruptcy improperly affected their vested rights. The Joneses' interest in the property was never protected by the stay in the Coangelic bankruptcy.

Coangelic, the only party arguable protected by the automatic stay in the Coangelic bankruptcy, is not a party to this case. Nor could Coangelic reasonable argue the foreclosure violated the automatic stay in light of the order retroactively anulling the automatic stay to a date prior to the foreclosure sale in this case.

For all these reason, the trial court's order granting summary judgment was indisputable correct, and will be affirmed.

II. Attorney's Fees

A prevailing party is entitled as a matter of right to recover costs. (Code Civ. Proc., § 1032, subd.(a)(10).) "In any action on a contract, where the contract specifically provide that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded... to the prevailing party, then the party who is determined to be the party prevailing on the contract... shall be entitled to reasonable attorney's fees in addition to other costs. ¶ Reasonable attorney's fees shall be fixed by the court, and shall be an element of the costs of suit." (Civ. Code, § 1717, subd. (a).) Since attorney's fees authorized by contract are recoverable as an element of costs, they need not first be pleaded as an item of damages in order to be awarded. (*Allstate Ins. Co.v. Loo* (1996) 46 Cal.App.4th 1794,1797 -1798.)

The deed of trust on the property provides, " If Borrower fails to perform the covenants and agreements contained in this Security Instrument, or there is a legal

proceeding that may significantly affect Lender's rights in the Property (such as proceedings in bankruptcy, probate, for condemnation or forfeiture or to enforce laws or regulations), then Lender may do and pay for whatever is necessary to protect the value of the Property and Lender's rights in the Property. Lender's actions may include .... paying reasonable attorneys' fees...[¶] Any amounts disbursed by this Security Instrument. Unless Borrower and Lender agree to other terms of payment, these amounts shall bear interest from the date of disbursement at the Note rate and shall be payable, with interest, upon notice from Lender to Borrower requesting payment. "

This provision clearly applies to the instant action. Pursuant to this agreement, the attorney's fees incurred by Bank became "additional debto of " the Joneses, and they were obligated to pay those fees. The Joneses contend thae clause does not apply because they sued Bank only in its capacity as "purchaser" of the property, not as "lender." The argument is untenable. The Joneses' complaint alleged " the defendants and each of them caused title to the subject property to be transferred to the defendant [Bank] through a foreclosure sale in violation of the automatic stay order... without seeking judicial relief therefrom." It is apparent that the Joneses sued Bank for its alleged improprieties in foreclosing on the property in its capacity as lender, as well as purchaser. The attorney's fee clause therefore applies.

The Joneses raise a multitude of arguments against the award of attorney's fees, which can be characterized as three main objections: the award of attorney's fees is barred by the discharge in bankruptcy obtained by Michael Jones; the awardviolates the automatic stay in Yvonne Jone's then-pending bankruptcy; and the award constitutes an inan improper deficiency judgment. We address these arguments

in turn. [13]

A. Effect of Michael Jones's Bankruptcy

When a plaintiff continues to pursue an action after obtaining a discharge under Chapter 7, the plaintiff is not dicsharged from contractual liability for attorney's fees incurred by the defendant subsequent to the plaintiff's petition in bankruptcy. Such fees constitute nondischargeable post-petition debt. (*In re Hadden (Bankr. W.D. Wisc. 1986) 57 B.R. 187, 188.)* Michael Jones filed his petition for bankruptcy under Chapter 7 shortly before commencing this action.[14] As all of the attorney's fees awarded were incurred post-petition, the discharge could not have affected his obligation to pay these fees. The Joneses contend, however, that the discharge extinguished the deed of trust itself, there fore no contractual basis existed for the award of feew. This is incorrect. The

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[13] The Joneses also contend the amount of the award constituted an abuse of discretion, and Bank failed to mitigate its fees. The Joneses did not designate the reporter's transcript for the hearing on their motion to tax costs as part of the record on appeal. To the extent the record is inadequate, we draw all reasonable inferences in favcor of the judgment. (*Maria P. v. Riles (1987)* 43 Cal.App.4th 1784, 1794.) We therefore assume the trial court did not abuse its discretion in calculating costs and attorney's fees. In any event, there is no "failure to mitigate" defense for attorney's fees reasonable incurred. The Joneses take the position that they should not be liable for attorney's fees because Bank rejected their offers to establish a new payment plan to pay off their debt. Bankr was not required to accept the consequences of the proper foreclosure sale and pay Bank's attorney's fees for their unsucessful challenge to the foreclosure.

[14] Michael Jones's subsequent Chapter 13 petition was dismissed.

discharge may have prevented Bank from enforcing the terms of the agreement to collect pre-petition debt, it did not terminate the agreement with respect to attorney's fees subsequently incurred.[15] (*Siegel v. Federal Home Loan Mortgage Corp.* (9th Cir. 1998) 143 F. 3d 525, 531; *In re Sure-Snap Corporation* (11th Cir. 1993) 983 F.2d 1015, 1018-1019.) As the Ninth Circuit stated in *Siegel*, " this is a case where the debtor had been freed from the untoward effects of contracts he had entered into. [Defendant] could not pursue him further, nor could anyone else. He, however, chose to return to the fray and to use the contract as a weapon. It is perfectly just, and within the purposes of bankruptcy, to allow the same waspon to be used against him.[16] (*Siegel v. Federal Home Loan Mortgage Corp., supra, 143 F.3d at p. 533.)*

B. <u>Effect of Yvonne Jones's Bankruptcy</u>

The Joneses contended that the award of attorney's fees violated the zutomatic stay in Yvonne Jones's then-pending bankruptcy. In her brief on appeal, Yvonne Jones represents that she received a discharge in bankruptcy subsequent to the attorney's fee award and contends this discharge voids the judgment against her.

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[15] For the same reason, the Joneses' personal liability for attorney's fees is not affected by Yvonne Jones's Chapter 7 petition filed and discharged in 1995. Bankruptcy allows a debtor a fresh start by discharging pre-petition debts; it does not immunize a debtor from liability for obligations subsequently incurred.

[16] By a parity of reasoning, the agreement to pay attorney's fees memorialized in the deed of trust was not extinguished by the foreclosure sale. While the sale extinguished the security interest, the obligation remained.

Regardless of the effect of the order terminanting the stay in Yvonne Jones's bankruptcy, her bankruptcy proceedings do not affect the order to pay attorney's fees because, as with Michael Jones's bankruptcy under Chapter 7, Yvonne Jones's petition for relief under Chapter 13 was filed before any of the attorney's fees were incurred in this case.

Although this action was filed on May 2, 1996 , Bank's counsel's declaration sought fees incurred after July 11, 1996. Yvonne Jones's petition under Chapter 13 was filed on July 2, 199. Therefore, all fees awarded in this case were inclurred post-petition and were not affected by the bankruptcy.

C. <u>Anti-Deficiency Statute</u>

California law precludes deficiency judgments following nonjudicial foreclosures. (Code Civ. Pro., §580d) A deficiency judgment is " a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property... was given as security, following the exercise of the power of sale in such deed of trust or mortgage." (Code of Civ. Proc., §580a.) In short, it is "' a personal judgment against the debtor-mortgagor for the difference between the fair market value of the property held as security and the outstanding indebtedness.'" (*Birman v. Loeb* (1998) 64 Cal.App.4th 502,511.)

It is apparent that the award of attorney's fees and costs in favor of Bank is not a deficiency judgment. It is not measured by the difference between the fair market value of the property at the time of sale and the outstanding indebtedness. Instead, it is measured by the reasonable

attorney's fees incurred by Bank in an action filed after the foreclosure.

The issue arises as to whether the award of attorney's fees and costs, although not strictly a deficiency judgment, violates the policy behing the statute prohibiting deficiency judgments. " The purpose of [Code of Civil Procedure] section § 580d is to put judicial foreclosure on a parity with private foreclosure. [Citation.} When a creditor judicially forecloses, the debtor retains the right to redeem to property and this right has the effect of insuring that the security will satisfy a realistic share of the debt. [Citation.] In a nonjudicial foreclosure ther is no right to redeem, but the proscription against a deficiency judgment has a comparable effect of making the security satisfy a realistic share of the debt." (Passanisi v. Merit-McBride Realtors, Inc. (1987) 190 Cal.App.3d 1496, 1507.) This policy is not implicated by a judgment for attorney's fees in an action challenging the propriety of the foreclosure, (*Id.*at pp. 1508- 1509.) In Passanisi, the debtors had sought to enjoin the trustee's sale. Their action was unsuccessful, and the creditor was awarded attorney's fee. After the creditor foreclosed on the property, the debtors argued the attorney's fee award was no longer enforceable. The court of appeal disagreed. " In considering the purposes of section 580d, we conclude that when a creditor-beneficiary prevails in an action brought by the debtor-trustor to restrain foreclosure of the security and is awarded attorney's fees and costs, the subsequent sale of the property at a trustee's sale does not render the judgment for attorney's fees and costs unenforceable. Section 580d does not by its express terms apply in such a case, nor does the policy hind section 580d dictate such a result. Enforcement of the judgment for attorney's fees and costs is not simply a subterfuge for the collection of a deficiency on the secured note. The award for attorney's fees and costs is neither measured by, nor interrelated to, a deficiency on the note.

Such an award is not attributable to a general condition of the real estate market, but is a result of the debtor-trustor's voluntary act in bringing an unmeritorious suit which the creditor-beneficiary was required to make expenditures to defend the judgment for attorney's fees and costs is entirely independet of the problems encompassed by antideficiency legislation and the enforcement of such a judgment will not affect the parity of remedies such legislation is intended to foster. " ." (*Passanisi v. Merit-McBride Realtors, Inc., Inc.,supra,* 190 Cal.App.3d at p. 1509.)

The Joneses argue that Passanisi is distinguishable in that it involved a preforeclosure award of attorney's fees while this case involves a post-foreclosure award. The distinction makes the award of fees more appropriate in this case.

The court held the award of fees in Passanisi was not extinquished by the foreclosure, despite the fact the fees could have been added to the creditor's security under the terms of the dee of trust. (*Id.*at p. 1507, fn. 7.) In this case, the attorney's fees could not possibly have been included in the debt at the time of the foreclosure, because they had not yet been incurred the attorney's fees constitute a separate obligation arising subsequent to the trustee's sle, their award does not implica the policy behind the anti-deficency statute.

DISPOSITION

The judgment is affirmed. The Joneses are to pay defendants' costs on appeal. Bank is awarded its reasonable attorney's fees on appeal pursuant to Civil Code section 1717.

NOT TO BE PUBLISHED.

GRIGNON, J

We concur:

TURNER, P.J. GODOY PEREZ, J.

SUPERIOR COURT OF CLAIFORNIA, COUNTY OF LOS ANGELES

12/09/97)DEPT. 4
Honorable Kurt Lewin Judge) L. RIVAS Deputy clerk
KATHLEEN TORRES Electronic Recording Monitor
J.COLLINS, CSL
Deputy Sheriff

9:30 am) BC149236 Plaintif
MICHAEL WILLIAM JONESCounsel ANDREW EDWARD
YVONNE B. JONES (X)SMYTH (X)

VS.

AMERICAN SAVINGS BANK, Defendant
N.A. MORTGAGE, INC, PATCounsel
LANE etc et al

NATURE OF PROCEEDINGS:
DEFENDANTS WASHINGTON MUTUAL BANK, FA, FORMERLY KNOWN AS AMERICAN SAVINGS BANK, FA; NA MORTGAGE SERVICE, INC. AND PATRICA LANE'S MOTION FOR SUMMARY JUDGMENT
AND MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT.

THE MOTIONS FOR SUMMARY JUDGMENT ARE CALLED FOR HEARING AND ARGUED.

THE MOTION OF PLAINTIFFS FOR SUMMARY JUDGMENT IS DENIED. THE MOTION OF DEFENDANTS FOR SUMMARY JUDGMENT IS GRANTED FOR THE REASONS AND ON THE GROUNDS SET FORTH IN THE MOTION DOCUMENTS FILED HEREIN AND PURSUANT TO THE COURT'S COMMENTS THIS DATE AS REFLECTED IN

ELECTRONIC RECORDING OF TODAY'S PROCEEDINGS WHICH IS INCORPORATED HEREIN BY THIS REFERENCE AS IF FULLY SET OUT.
COUNSEL FOR THE THE DEFENDANTS IS DIRECTED TO PREPARE A SUMMARY JUDGMENT IN ACCORD HEREOF, SERVE A COPY ON DEFENDANTS PRIOR TO LODGING THE ORIGINAL WITH THIS COURT FOR ITS SIGNATURE.

PAGE 1 OF 1 DEPT. 4 MINUTES ENTERED 12/09/97 COUNTY CLERK.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

MICHAEL WILLIAM JONES and YVONNE B. JONES, Plaintiffs, vs. AMERICAN SAVINGS BANK,a corporation, PAT LANE, an individual) and does 1-100, inclusive, Defendants.)ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ENTERED MAY 6, 1998

The Motion for Summary Judgment of defendants Washington Mutual Bank, FA, formerly known as American Savings Bank, F.A. N.A. Mortgage Services, Inc. and Patricia Lane (collectively," plaintiffs") .
After full consideration of the evidence, the separate statements submitted by the parties, and the authorities submitted by counsel, as well as oral argument by counsel, the Court finds that there is no triable issue for fact as to the

First, Second, Third and Fourth Causes of Action asserted in plaintiffs' Verified First Amended Complaint (1) to quiet title, (2) for cancellation of deed, (3) for declaratory relief, and (4) for conversion dated July 31, 1996 (the " Complaint") and that summary judgment is granted in favor of defendants for the following reasons:

Each of plaintiffs' claims arises from a single contention: that, in completing an April 19, 1996 trustee's sale of plaintiffs' real property, defendants violated an automatic stay effected by a bankruptcy proceeding involving the Conangelic Trust, an entity to which plaintiffs had transferred a 5% interest in plaintiffs' real property on the eve of the trustee's sale. Since bankruptcy courts possess exclusive jurisdiction over all claims based on or arising out of a violation of an automatic stay, this Court cannot adjudicate the claims alleged in the Complaint.

More over, in proceeding with the trustee's dale, this Court finds, as an independent basis for granting summary judgment, that defendants did not violate, and could not have violated, the automatice stay because the United States Bankruptcy Court for the District of Pueerto Rico, in which the Coangelic Trust bankruptcy petition was filed, retroactively anulled the stay to March 12, 1996, over one month before the April 19,1996 trustee's sale.

This action is dismissed with prejudice as to defendants, and each of them , and defendants are entitle to recover costs of suit and attorney' fees pursuant to the applicable Note and Deed of Trust.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED THAT DEFENDANTS' Motion for Summary Judgment is Granted and that final judgment shall enter in accordance with this Order. DATED MAY 6, 1998

KURT J. LEWIN / THE HONORABLE KURT LEWIN
JUDGE OF THE SUPERIOR COURT.

SUPERIOR COURT OF CLAIFORNIA, COUNTY OF LOS ANGELES

12/09/97)DEPT. 4
Honorable Kurt Lewin Judge) L. RIVAS Deputy Clerk
DeputyHonorable JUDGE PRO TEM
Electronic Recording Monitor (NONE)
J.COLLINS, CSL
Deputy Sheriff

2:00p.m BC149236 Plaintiff
MICHAEL WILLIAM JONESCounsel
YVONNE B. JONES (X)
vs.
AMERICAN SAVINGS BANK, Defendant
N.A. MORTGAGE, INC, PATCounsel
LANE etc et al

NATURE OF PROCEEDINGS:
RULING ON SUBMITTED MATTER

ON THE MOTION BY DEFENDANT WASHINGTON MUTUAL BANK, FA, FORMERLY KNOWN AS AMERICAN SAVINGS BANK, FA, FOR ATTORNEYS FEES AND COSTS PURSUANT TO AGREEMENT; HERETOFORE ARGUED AND SUBMITTED, THE COURT NOW RULES AS FOLLOWS:
ON THE MOTION BY DEFENDANT WASHINGTON MUTUAL BANK FORMERLY KNOWN AS AMERICAN SAVINGS BANK, FA, FOR ATTORNEYS' FEES AND COSTS PURSUANT TO AGREEMENT; HERETOFORE ARGUED AND SUBMITTED, THE COURT NOW

RULES AS FOLLOWS:

Passanisi v. Merit - McBride Realtors (1987) 190 cal.pp.3d 1496, cited by defendants is apposite, controlling and has an a fortiori application in this action. Here, the costs and attorney's fees sought were not known nor incurred until after the private sale of the property and thus could not have been included in the creditor - beneficiary's credit bid at the time of sale. This obviates the possibility of any " surplusage" problem addressed by the court in Passanisi. ¶ The Court finds that attorney's fees in the amount of $60, 548.00 and costs in the amount of $4,027.06 to be necessary, and awards the foregoing amounts as prayed.

ACOPY OF THIS MINUTE ORDER IS MAILED VIA U.S. MAIL TO BOTH SIDES.

Page 1 of 1 DEPT. 4 Minutes entered 07/10/98

COUNTY CLERK

SECOND APPELLATE DISTRICT
DIVISION FIVE

MICHAEL W. JONES et al., No. B126794

Plaintiffs and Appellants, (Super. Ct. No.BC149236)
Los Angeles County

v.

AMERICAN SAVINGS BANK et al.,

(Defendants and Respondents.

Filed September 28, 1999

THE COURT:

The record on appeal has been filed as of the date of this order. On the court's own motion and so as to avoid further delay.

IT IS HEREBY ORDERED that appellants' opening briefs and appendix shall be filed September 3, 1999. The respondents' brief shall be filed September 21, 1999. The reply briefs shall be filed September 28, 1999.

IT IS FURTHER ORDERED that no extensions will be granted pursuant to any court rules.

Oral argument in the above matter and Case No B 122905, is set for October 6, 1999, at 9:00 a.m., before Division 5.

MARGRET GRIGNON, ACTING PRESIDING JUSTICE.

SECOND APPELLATE DISTRICT
DIVISION FIVE

MICHAEL W. JONES et al., B122905 and

B126794

Plaintiffs and Appellants,
(Super. Ct. No.BC149236)

v.
AMERICAN SAVINGS BANK et al.,

(Defendants and Respondents.)

Order filed 10/06/99

Request for permission to file supplemental brief is denied.

SECOND APPELLATE DISTRICT
DIVISION FIVE

MICHAEL W. JONES et al., B122905 and B126794

Plaintiffs and Appellants, (Super. Ct. No.BC149236)

v.

AMERICAN SAVINGS BANK et al.,)

(Defendants and Respondents.)

Order dated 11/03/99

Petition for rehearing is denied.

Margaret Grignon, Acting Presiding Justice.